(1999) 11 BOM CK 0010

In the Bombay High Court

Case No : First Appeal No. 343 of 1983

Nihalchandji Chhogmalji, Since Deceased, by his heir and Others — APPELLANT

Vs

Babulal Kisturchandji — RESPONDENT

Date of Decision : 19-11-1999

Acts Referred:
Stamp Act, 1899 — Section 34, 43

Citation : (2000) 102 BOMLR 240

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

J.A. Patil, J.—This is Plaintiffs appeal against the judgment and decree dated 15th December, 1982 passed in Summary Suit No. 692 of 1965 by the Judge, City Civil Court, Bombay, whereby the Plaintiffs claim for recovery of an amount of Rs. 12,751/- together with interest thereon came to be dismissed.

2. The Plaintiff had filed the abovementioned suit on the basis of a hundi dated 27th June, 1965 drawn by the Defendant on M/s, Shah Babulal Bastimal and Company at Mumbai. According to the Plaintiff, the said hundi was a Shahjog Hundi and it was for a valid consideration. The Plaintiff endorsed the said hundi in favour of one Kundanmalji Fatehchandji of Mumbai and the said Kundanmalji Fatehchandji presented the said hundi for payment to the Bank of Maharashtra. The said Bank, in its turn, presented the hundi for payment to the drawee Babulal Bastimal and Company. However, the said hundi was dishonoured by the drawee with the result, the Plaintiff was constrained to file the suit to recover the amount with interest.

3. The Defendant was granted conditional leave to defend the suit on his depositing in the Court a sum of Rs. 6000/-. The Defendant filed his written statement, wherein the Defendant admitted the execution of the said hundi, but contended that it was without consideration. The defendant, inter alia, contended

that the said Hundi is a Shahjog Hundi and that it was inadmissible in evidence, since it was not duly stamped. The Defendant pointed out that there was a transaction between him and the Plaintiffs brother Rikabdas Chhogmal in respect of the sale of the latter''s factory, which was run in the name and style of Ambe Mahalaxmi Metal Industries at Falna in Rajasthan. The said transaction had taken place on 21st August, 1964 and according to the Defendant, the Plaintiffs brother Rikabdas Chhogmal had agreed to sell his business along with the shed in which the factory was run and the goodwill, structure, furniture, stock-in-trade, etc. for a sum of Rs. 34001/-. This price was inclusive of the price of the shed which was fixed at Rs. 12751/-. On the same day, the Defendant executed two hundis in favour of Rikabdas Chhogmal -.one for Rs. 17000/- and the other for Rs. 17001/-. The first hundi was honoured on or about 1st September, 1964. As regards the second hundi, there was later on some negotiations between the Defendants and the said Rikabdas Chhogmal and as per the said negotiations, the second hundi for Rs. 17001/-was cancelled and in its place, the Defendants executed a fresh hundi for Rs. 12751/-. The Defendant further contended that inspite of his willingness to transfer the shed in his favour, Rikabdas Chhogmal did not do so and, therefore, inspite of the agreement to transfer the shed, Rikabdas failed to transfer the shed as he was not competent to do so. Hence, according to the Defendant, he was not liable to pay the sum under the said hundi as there was failure of consideration on the part of Rikabdas Chhogmal.

4. The learned Judge framed necessary issues and allowed the parties to led their respective oral and documentary evidence. Upon consideration of the evidence, the learned Judge came to the conclusion that the said hundi was not a Shahjog Hundi and, therefore, it was a Bill of Exchange within the meaning of the Negotiable Instruments Act. The learned Judge, however, held that since the said hundi was not duly stamped, it was not admissible in evidence in view of the bar of Section 43 of the Indian Stamps Act. The learned Judge accepted the Defendant''s plea regarding failure of consideration. In this view of the matter, the learned Judge came to the conclusion that the Plaintiff had failed to prove his claim and, therefore, he was not entitled to recover the amount claimed. Consequently, the learned Judge dismissed the suit with costs.

5. I have heard Shri Abhyankar, learned Advocate for the Appellant-Plaintiff, and Shri N.J. Devasharayee, instructed by Shri N.N. Vaishnav for the Respondent. I have also gone through the entire oral and documentary evidence. It may be noted that the Plaintiffs claim is based solely on the said hundi. It is, therefore, obvious that the Plaintiffs suit will stand or fall depending upon the admissibility, proof and validity of the said hundi. Therefore, before turning to the rival contentions regarding the exact nature of the said hundi, it would be proper to reproduce the contends of the said hundi. The said hundi is produced at Exhibit P-4 in the Trial Court and its English translation runs as under (Page 9 of the Appeal paper-book) :

Shree

Hundi No.

Mark on the paper :

Handwriting of:- Shah Babulal Kisturchandji.

To

The Revered Bhai Shri Shah Babulal Vastimal and Co., at the auspicious place of the Bombay; written from Falna by Bhai Babulal Kisturchandji whose Jai Jinendra salutations may you be pleased to read : Further, I Hundi for Rs. 12,751/- in words rupees twelve thousand seven hundred and fifty one, double of half the amount of Rupees six thousand three hundred seventy-five and fifty N.P. is drawn in favour of Bhai Shree Nihalchand Chhogmal, Golwad.

Through:-

Passed on Jam Vadi 13 (i. e. 27th June, 1965). Immediately on receipt of the Hundi, please pay to the payee the amount of the Hundi in currency.

Samvat 2021 tuner day Jeth Vadi 13, Date 27th June, 1965, Sunday. Written by : the hand of Shah Babulal Kisturchandji.

6. Perusal of the hundi shows that the order of payment is unconditional and the same is directed to a certain person, that is, Babulal Vastimal and Co. It is further seen that the hundi is for the payment of a certain sum; that is, Rs. 12751/-. The said hundi is signed by the maker, that, the Defendant. Admittedly, the said hundi is not duly stamped. However, according to the Plaintiff the suit hundi is a Shahjog Hundi and, therefore, it is not a Bill of Exchange, which requires to be duly stamped. The Defendant, on the other hand has disputed this position.

7. The learned trial Judge has carefully considered the exact nature of the suit hundi with reference to the decision of this Court in Champaklal Gopaldas Vs. Keshrichand Maganlal, wherein all legal aspects regarding a Shahjog hundi are dealt with. It will be advantageous to note the following observations made in the said case :

A Shahjog hundi in its inception is a hundi which passes from hand to hand by delivery and requires no endorsement hand by. The name of the depositor is mentioned in the body of the hundi, but there is no direction in the hundi that the amount is to be paid either to the depositor or to his endorsee. Indeed the body of the hundi requires that the amount be paid to a Shah. It contemplates the hundi passing from hand to hand until it reaches a Shah who, after asking due enquiries to secure himself, would present it to the drawee for acceptance or for payment.

As pointed out above, the learned Judge has given a specific finding that the suit hundi is not a Shahjog hundi. Shri Abhyankar, learned Advocate for the Appellant, tried to contend to the contrary to persuade me to hold that the suit hundi (Exhibit P-4) is a Shahjog hundi. However, I do not find any infirmity with the finding recorded by the learned trial Judge with regard to the nature of the suit hundi. The learned Judge has given cogent reasons, which Shri Abhyankar could not dislodge. It may be noted that a Shahjog dislodge. It may be noted that a Shahjog hundi differs from other hundis and its distinguishing feature is that it does not contain the name of the person to whom or to whose order the hundi is to be paid, but it contains a direction that the amount shall be paid to a Shah. The learned Judge has pointed out that the direction that the amount be paid to a Shah is conspicuously absent in the suit hundi. In the abovementioned Champaklal''s case it was held that the moment the name of the person to whom the payment is to be made is included in the hundi, it ceases to be a Shahjog hundi and it becomes a Namjog hundi. The suit hundi contains the name of the person to whom payment is to be made. Therefore, there is absolutely nothing wrong with the finding recorded by the learned trial Judge, that the suit hundi is not a Shahjog hundi.

8. Once it is found that the suit hundi is not a Shahjog hundi, then it follows that it is a Bill of Exchange, which requires to be stamped before it can be admitted in evidence or acted upon. Since, admittedly, the suit hundi (Exhibit P-4) is not duly stamped, the bar of Section 34 of the Indian Stamp Act becomes operative and renders the suit hundi inadmissible in evidence. Since the suit of the Plaintiff is not based on an alternative prayer of original consideration and as the suit claim is solely based on the suit hundi, Exhibit P-4, which is inadmissible in evidence, the Plaintiff is bound to fail. In this respect, the learned Counsel for the respondent, relied upon the decision in the case of Yogendra Patwardhan u. Khandelwal Hermann Electronics Ltd. 90 Bom. L.R. 560 : 1989 M.L.J. 310 wherein the learned Single Judge of this Court has held that a summary suit is a suit on document and if the document itself is not admissible or cannot be acted upon for want of proper stamp, the same cannot be sustained. In view of this position, I am of the opinion that the learned trial Judge was very much right in dismissing the suit of the Plaintiff on this basic and crucial count.

9. The Plaintiff has contended that the suit hundi was for a valid consideration, whereas the Defendant, on the other hand, has refuted this contention. There is no dispute of the fact that there was a transaction between the brother of the Plaintiff Rikabdas Chhogmal and the Defendant in respect of the sale of the former''s factory at Falna in Rajasthan. The said transaction was for a total consideration of Rs. 34001/- and according to the Plaintiff the said price was only for the moveables, etc. in the factory and it did not include the price of the plot and the shed. However, this contention of the plaintiff was rightly rejected in the light of his statement in examination-in-chief which is to the following effect :

There was an agreement of sale of the factory of my brother Rikabdas, the shed in Mahalaxmi Metal Estate, the furniture, the stock-in-trade and goodwill, between my brother Rikabdas and the defendant for Rs. 34001/-.

During the cross-examination, the Plaintiff was confronted with some documents, including the writing Exhibit P-7 made by his brother Rikabdas in favour of the Defendant. The Plaintiff admitted that writing at Exhibit P-7 is not in his handwriting and that it was signed by him, his brother Rikabdas and one Vardichand Chimnaji. The Plaintiff further admitted that as per the said writing the price of Rs. 34001/- included the price of the shed. Admittedly, Rikabdas did not or could not transfer the shed of the factory in favour of the Defendant. It is, therefore, clear that there was failure of consideration on the part of the Plaintiff and/or his brother Rikabdas, for which the suit hundi was executed by the Defendant. It will thus be seen that the learned trial Judge was right in holding that the suit hundi Exhibit P-4 was without consideration.

10. No other point was urged before me and in the light of the above discussion, I do not find any valid reason/ground to hold that the impugned judgment and decree ought to be set aside.

11. Consequently, the Appeal filed by the Plaintiff (Appellant) deserves to be dismissed. In the result, the Appeal is dismissed with costs.